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No. 91-767

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1991

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REPUBLIC NATIONAL BANK OF MIAMI, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES

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## QUESTION PRESENTED

Whether the court of appeals lacks jurisdiction over an appeal from an *in rem* forfeiture proceeding after the proceeds of the sale of the *res* have been released from the district court's control and deposited in the United States Treasury.

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## BRIEF FOR THE UNITED STATES

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9; J.A. 29-37) is reported at 932 F.2d 1433. The opinion of the district court (Pet. App. A10-A29; J.A. 5-24) is reported at 731 F. Supp. 1563.

### JURISDICTION

The judgment of the court of appeals was entered on June 10, 1991. A petition for rehearing was denied on August 7, 1991. J.A. 38-39. The petition for a writ of certiorari was filed on October 31, 1991, and was granted on February 24, 1992. Petitioner invoked the jurisdiction of this Court under 28 U.S.C. 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, § 9, Cl. 7, and Art. III, § 2, of the Constitution; 21 U.S.C. 881; 28 U.S.C. 524(c); Federal Rule of Civil Procedure 62; and Rules C and E of the Supplemental Rules for Certain Admiralty and Maritime Claims are reprinted at App., *infra*, 1a-31a.

## STATEMENT

1. In February 1988, the United States filed an *in rem* action in the United States District Court for the Southern District of Florida, seeking forfeiture of a single family residence at 6960 Miraflores Avenue in Coral Gables, Florida. The complaint alleged that Indalecio Iglesias was the true owner of the property and that Iglesias had purchased the property with the proceeds of narcotics trafficking. On February 26, 1988, a warrant to arrest the property was issued. On March 7, 1988, the United States Marshal seized the property. J.A. 6, 26.

In response to the complaint, Thule Holding Corporation, a Panamanian shell corporation, filed a claim stating that it was the owner of the Miraflores Avenue residence. Petitioner also filed a claim asserting an $800,000 lien interest in the property pursuant to a mortgage recorded on September 30, 1987. Thule subsequently withdrew its claim and consented to forfeiture of the property. At the government's request, petitioner agreed to an interlocutory sale of the property. On June 1, 1988, the residence was sold for $1,050,000, and the proceeds were retained by the Marshal pending disposition of the case. J.A. 6 & n.2, 8.

2. The evidence at trial showed that on December 10, 1980, Iglesias was arrested by the Customs Service

on board a Colombian vessel containing 300 pounds of marijuana. In April 1981, Bahamian officials arrested Iglesias for possession of 3,000 pounds of marijuana and fined him $10,000. In addition, a DEA agent presented information obtained from confidential informants that Iglesias imported approximately 30,000 kilograms of cocaine into the United States from Colombia between 1980 and 1985. An informant estimated that Iglesias made $180 million in profits from drug trafficking. J.A. 7-8.

Iglesias, acting through Thule, purchased a lot and partially-constructed residence at 6960 Miraflores Avenue in 1983. To complete construction of the residence, Iglesias paid a contractor a total of between $200,000 and $220,000 in cash installments of $7,000 to $9,000. Iglesias paid a second contractor $140,000, mostly in cash. After the residence was completed, Iglesias and his family lived there. J.A. 8.

In August 1987, Iglesias learned that the IRS had begun an investigation of him and the Miraflores Avenue property. Iglesias immediately put the house up for sale and approached Miami lenders to secure a mortgage on the property. Petitioner was approached by Ramon Puentes, who claimed that he and a partner owned the property. That claim was contradicted by documents submitted to petitioner in support of the loan request, which showed that Thule owned the property and that Thule's stock was wholly owned by Antonio Munoz Caballero. J.A. 9, 19.

Petitioner nevertheless agreed to provide an $800,000 one-year "balloon" note on the property, which was appraised at $1.2 million. The loan was approved quickly, outside of petitioner's normal lending channels. Petitioner did not ask the purpose of the loan, investigate Thule (the corporate borrower), or con-

duct a title search of the property. When the loan was approved, the residence was vacant. Puentes used some of the proceeds of the loan to buy expensive gifts for the family of petitioner's president, who was personally involved in approving the loan. Puentes also used some of the proceeds of the loan to purchase an airplane ticket to Switzerland for Iglesias. Petitioner transferred most of the proceeds of the loan to Iglesias's Swiss bank account. Iglesias fled the United States shortly after this transaction. J.A. 9, 18-19.[1]

The district court ordered petitioner's interest in the property forfeited. J.A. 5-28. The court found that there was probable cause to believe that "Iglesias bought the Miraflores property and constructed the residence with drug profits, and then laundered the money through [petitioner's] mortgage into his Swiss bank account." J.A. 11. The court held that petitioner was entitled to assert an innocent owner defense to the seizure of the property, but that petitioner was not an innocent owner.[2] In particular, the court found that the borrower was a Panamanian shell corporation unknown to petitioner; that the borrower's principal asset was a vacant residence that was for sale when the loan was made; that the borrower had no business and could not demonstrate how the loan was to be repaid; that petitioner structured

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[1] While the forfeiture action was pending, Iglesias was indicted in the Southern District of Florida on narcotics charges. J.A. 30-31.

[2] The government argued that the relation back doctrine precluded petitioner from raising an innocent owner defense. See J.A. 11-16. That doctrine is before the Court in *United States* v. *A Parcel of Land, etc.*, cert. granted, No. 91-781 (Mar. 2, 1992).

the loan in an unusual fashion and did not establish a repayment schedule for the loan; that the bank did not inquire why a loan was necessary if the property was about to be sold; that once the loan was approved, Puentes gave a $3,000 vacation trip to members of the family of petitioner's president; and that petitioner transferred the proceeds of the loan to a Swiss account. J.A. 18-20.

3. On March 15, 1990, the district court issued a final judgment of forfeiture. J.A. 25-28. Petitioner filed a notice of appeal, but did not post a supersedeas bond or file a motion to stay execution of the judgment. Accordingly, on April 20, 1990, the United States Marshal transferred the proceeds from the sale of the house to the United States Treasury. J.A. 29.

4. The court of appeals dismissed petitioner's appeal for lack of jurisdiction. J.A. 29-37. Relying on its *en banc* decision in *United States* v. *One Lear Jet Aircraft*, 836 F.2d 1571 (11th Cir.), cert. denied, 487 U.S. 1204 (1988), the court held that removal of the proceeds of the sale of the house from the jurisdiction of the district court terminated the court's *in rem* jurisdiction. J.A. 32-34. The court explained that "[w]here an appellant fails to file a stay of judgment or a supersedeas bond, and the *res* is removed from the court's territorial jurisdiction, the appellate court does not have *in rem* jurisdiction." J.A. 33 (quoting *One Lear Jet*, 836 F.2d at 1573).

The court also rejected petitioner's argument that the court had *in personam* jurisdiction because the government had served petitioner with the complaint of forfeiture. The court noted that the defendant in an *in rem* action is the property itself, and held that "the government did not consent to the court's *in personam* jurisdiction * * * merely by notifying poten-

tial claimants that an *in rem* action has commenced." J.A. 35. The court observed that the government was not required to serve petitioner with a copy of the complaint, but had done so as a courtesy. J.A. 34-35 (citing Supplemental Rules for Certain Admiralty and Maritime Claims, Rule C).

Finally, the court held that the government was not estopped from contesting the jurisdiction of the court of appeals based on its agreement that the United States Marshal would retain the proceeds of the sale pending the district court's order. J.A. 36-37. The district court entered a final judgment of forfeiture that required the United States to dispose of the proceeds of the sale according to law. The government's execution of the unstayed judgment was therefore proper.

## SUMMARY OF ARGUMENT

A civil forfeiture proceeding under 21 U.S.C. 881 is an *in rem* action. The defendant in an *in rem* action is a vessel or other property—the "*res*." Accordingly, it has long been recognized that *in rem* jurisdiction depends on the court's control of the *res*. That historic principle has been reaffirmed many times by this Court, and is reflected in the special procedural rules Congress has made applicable to actions *in rem*.

It is equally well settled that if the court releases the *res* from its custody, the court ceases to have *in rem* jurisdiction. Although this Court has recognized an exception to that rule in cases where removal of the *res* is fraudulent or otherwise improper, the general rule remains valid and is applied regularly in both forfeiture proceedings and other types of *in rem* actions.

In this case, the district court entered judgment in favor of the government. The claimant simply failed to post a supersedeas bond or seek a stay of the judgment. The government's removal of the *res* from the district was therefore entirely proper. Because the court no longer has control of the *res*, it lacks jurisdiction to consider an appeal from the district court's judgment in this *in rem* action.

Petitioner's arguments that the court of appeals retains jurisdiction despite the absence of the *res* are unpersuasive. Congress has expressly provided that the rules applicable to admiralty *in rem* proceedings shall apply in civil forfeiture proceedings. 28 U.S.C. 2461(b); 21 U.S.C. 881(b). Petitioner's contention that *in rem* principles derived from the law of admiralty should not govern forfeiture proceedings is accordingly properly addressed to Congress, not this Court. Moreover, Congress is presumed to have retained long-established legal principles unless a statutory purpose to the contrary is evident. Congress has made clear that it intends traditional principles of *in rem* jurisdiction to apply in forfeiture proceedings unless those principles are expressly modified by statute. Even if this Court has authority to expand the limited jurisdiction of federal courts by modifying traditional *in rem* principles, it would be unwise to do so where Congress has legislated on the assumption that the traditional rules will apply unless altered by statute.

Any departure from the established rule grounding *in rem* jurisdiction on a federal court's continuing control over the *res* would raise serious constitutional concerns. First, the court's ability to grant relief in an *in rem* action depends upon its ability to control the disposition of the *res*. Once the *res* is beyond the

court's control it cannot grant *in rem* relief, and accordingly there is no longer a live controversy before the Court. As with mootness, standing, and other aspects of the Article III case or controversy requirement, the requirement that the court have the ability to grant relief through control of the *res* must be satisfied at each stage of the litigation.

Second, petitioner's appeal in this case is barred because a judgment in its favor would require payment of money from the Treasury without statutory authorization, in violation of the Appropriations Clause. That Clause specifies in unambiguous terms that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Art. I, § 9, Cl. 7. A court in an *in rem* proceeding can order the return of the *res* to a prevailing owner without implicating this Clause, because the *res* is under the jurisdiction of the court. When, however, the *res* has been converted into money and deposited into the Treasury—because a losing claimant failed to stay an adverse judgment—the plain language of the Appropriations Clause precludes drawing money from the Treasury in the absence of an "Appropriation[] made by Law." Congress has authorized payment from the Assets Forfeiture Fund of the expenses of the seizure and sale of the property, payments to informants, and certain administrative payments to claimants at the discretion of the Attorney General. But because no statute authorizes the payment of a judgment to petitioner from the Treasury in this *in rem* case, petitioner cannot pursue an appeal.

Petitioner is incorrect in arguing that the United States submits to the court's *in personam* jurisdiction by bringing an *in rem* action. The distinction between

*in rem* and *in personam* jurisdiction turns on the substantive nature of the claim, not on whether the participants have invoked the aid of the court. In any event, Congress has not provided that the United States is subject to the court's *in personam* jurisdiction simply because it invoked the court's *in rem* jurisdiction, and accordingly principles of sovereign immunity prevent the court from exercising jurisdiction over the government on appeal. See *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1017 (1992).

Petitioner's effort to ground jurisdiction on Fed. R. App. P. 3(a) and 21 U.S.C. 881(j) is also misplaced. It is elementary that the Federal Rules do not confer jurisdiction. See Fed. R. App. P. 1(b). And Section 881(j), by its own terms, does not apply to petitioner because no criminal prosecution was pending when the forfeiture proceeding was brought. In any event, the venue provisions of Section 881(j) are just that—venue provisions. They do not confer jurisdiction.

Nor is applying the established rules of *in rem* jurisdiction unfair to losing claimants in civil forfeiture proceedings. Under the Federal Rules of Civil Procedure, a losing claimant is automatically entitled to a 10-day stay of a judgment of forfeiture. In addition, a claimant is entitled to obtain an automatic stay pending appeal by posting a supersedeas bond. And a claimant who is unable to post a bond may seek a stay from the district court or the court of appeals.

## ARGUMENT

### REMOVAL OF THE *RES* FROM THE CONTROL OF THE DISTRICT COURT DEPRIVES THE COURT OF APPEALS OF JURISDICTION IN AN *IN REM* ACTION.

#### A. In Rem *Jurisdiction Rests on Judicial Control of the Res.*

1. A civil forfeiture proceeding under 21 U.S.C. 881 is an action *in rem*. See *United States* v. *$84,740 U.S. Currency*, 900 F.2d 1402, 1404 (9th Cir. 1990); *United States* v. *United States Currency in the Amount of $2,857*, 754 F.2d 208, 212 (7th Cir. 1985). Section 881(b) expressly provides that "[a]ny property subject to civil forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property." 21 U.S.C. 881(b). In addition, 28 U.S.C. 2461(b) provides:

> Unless otherwise provided by Act of Congress, whenever a forfeiture of property is prescribed as a penalty for violation of an Act of Congress and the seizure takes place on the high seas or on navigable waters within the admiralty and maritime jurisdiction of the United States, such forfeiture may be enforced by libel in admiralty but in cases of seizures on land the forfeiture may be enforced by a proceeding by libel which shall conform as near as may be to proceedings in admiralty.

Although *in rem* actions are not the norm in our legal system, *in rem* forfeiture proceedings are an established feature of the legal landscape. "Long

before the adoption of the Constitution the common law courts in the Colonies—and later in the states during the period of Confederation—were exercising jurisdiction *in rem* in the enforcement of [English and local] forfeiture statutes." *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974) (quoting *C.J. Hendry Co.* v. *Moore*, 318 U.S. 133, 139 (1943)). Congress enacted statutes providing for *in rem* forfeitures "almost immediately after adoption of the Constitution," *Calero-Toledo*, 416 U.S. at 683, and several of this Court's earliest decisions concerning *in rem* jurisdiction arose from forfeiture proceedings. See *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827); *The Brig Malek Adhel*, 43 U.S. (2 How.) 210, 233 (1844). Indeed, the Court has suggested that *in rem* forfeiture proceedings have an even more ancient lineage, deriving from the medieval doctrine that "the value of an inanimate object directly or indirectly causing the accidental death of a King's subject was forfeited to the Crown as a deodand." *Calero-Toledo*, 416 U.S. at 680-681. See *United States* v. *United States Coin & Currency*, 401 U.S. 715, 719-720 (1971); O.W. Holmes, *The Common Law* 23-31 (M. Howe ed. 1963). In any event, "[t]he enactment of forfeiture statutes has not abated; contemporary federal and state forfeiture statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise." *Calero-Toledo*, 416 U.S. at 683. The Court has recognized that *in rem* forfeiture proceedings serve valid purposes, "both by preventing further illicit use of the [property] and by imposing an economic penalty, thereby rendering illegal behavior unprofitable." *Id.* at 687.

The "distinguishing and characteristic" feature of an *in rem* action is that the defendant is a *res*—a

vessel or other property—rather than a person. *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 427 (1867). See *Madruga* v. *Superior Court*, 346 U.S. 556, 560 (1954); *Canadian Aviator, Ltd.* v. *United States*, 324 U.S. 215, 224 (1945) ("personification of the vessel, treating it as a juristic person, * * * has long been recognized by this Court"); *Rounds* v. *Cloverport Foundry & Machine Co.*, 237 U.S. 303, 306-307 (1915); *The "Sabine"*, 101 U.S. 384, 388 (1880); G. Gilmore & C. Black, *The Law of Admiralty* § 1-12, at 36 (2d ed. 1975) (suit *in rem*—"against the thing" —is "a direct proceeding against the vessel or other property"). Because the *res* is the defendant in an *in rem* action, it has long been settled that the court must control the *res* in order to exercise *in rem* jurisdiction. In *The Brig Ann*, 13 U.S. (9 Cranch) 289 (1815), the Court held that "[i]n order to institute *and perfect* proceedings *in rem*, it is necessary that the thing should be actually or constructively within the reach of the court." *Id.* at 290 (emphasis added). The Court explained that the *res* "is actually within [the court's] possession, when it is submitted to the process of the court; it is constructively so, when, by a seizure, it is held, to ascertain and enforce a right or forfeiture which can alone be decided by a judicial decree *in rem*." *Ibid.* Similarly, in *United States* v. *The Little Charles*, 26 F. Cas. 979, 982 (C.C.D. Va. 1818) (No. 15,612), Chief Justice Marshall held that "possession of the thing is necessary as a foundation for the jurisdiction of the court" in an *in rem* action. He explained that "in proceedings in rem, the vested jurisdiction of the court could be divested by the loss of the thing," because "as the thing could neither be delivered to the [plaintiffs], nor restored to the claimants, the sentence would be

useless, and courts will not render judgments which can operate on nothing." *Ibid.*

This Court has repeatedly reaffirmed the principle that jurisdiction in an *in rem* proceeding rests on the court's control of the *res*. In *Taylor* v. *Carryl*, 61 U.S. (20 How.) 583, 599 (1858), for example, the Court held that "to give jurisdiction *in rem*, there must have been a valid seizure and an actual control of the ship by the marshal of the court." In *The Propeller Commerce*, 66 U.S. (1 Black) 574, 580-581 (1862), the Court explained:

> Process *in rem* is founded on a right in the thing, and the object of the process is to obtain the thing itself, or a satisfaction out of it * * *. Consequently, the court, through its process, arrests the thing, and holds possession of it by its officers, as the means of affording such satisfaction * * *. Unless * * * the suit *in rem* can be prosecuted in the district where the property is found, it cannot be prosecuted at all.

In *The Resolute*, 168 U.S. 437, 439 (1897), the Court explained that "[j]urisdiction is the power to adjudicate a case upon the merits. * * * As applied to a suit *in rem* * * * it presupposes * * * that the property proceeded against is within the lawful custody of the court." In *United States* v. *Mack*, 295 U.S. 480, 484 (1935), Justice Cardozo, relying on *The Brig Ann*, stated that "[o]ne of the essentials of jurisdiction *in rem* is that the thing shall be 'actually or constructively within the reach of the court.'" Most recently, in *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 363 (1984)—a forfeiture proceeding—the Court again reaffirmed that in actions *in rem*, "jurisdiction [is] dependent upon seizure of a physical object."

2. Because the court's jurisdiction in an *in rem* action is based on its control of the *res*, it has long been settled that release of the *res* generally deprives the court of jurisdiction. This Court recognized that principle in *The Brig Ann, supra.* In that case, United States customs officials seized a British merchant ship and instituted an *in rem* forfeiture proceeding against the vessel and her cargo. Several days after the seizure, however, government officials voluntarily released the ship. Justice Story's opinion for the Court held that the release of the *res* terminated the court's *in rem* jurisdiction. Construing the jurisdictional provisions of the Judiciary Act of 1789, the Court ruled that "[i]n order to institute and perfect proceedings *in rem*, it is necessary that the thing should be actually or constructively within the reach of the court." 13 U.S. (9 Cranch) at 291. Justice Story explained that "[i]f the place of committing the offence had fixed the judicial *forum*, * * * the law would have been, in numerous cases, evaded; for, by a removal of the thing from such place, the court could have had no power to enforce its decree." The Court therefore ruled that

> [i]f a seizure be completely and explicitly abandoned, and the property restored by the voluntary act of the party who has made the seizure, all rights under it are gone. Although judicial jurisdiction once attached, it is divested by the subsequent proceedings; and it can be revived only by a new seizure. * * *

*Ibid.* The Court expressly reserved the question whether "a tortious ouster of possession, or fraudulent rescue * * * will divest the [court of] jurisdiction." *Ibid.*

Petitioner contends (Pet. Br. 7-8) that this Court implicitly rejected the rule of *The Brig Ann* in two

subsequent decisions, *The Rio Grande*, 90 U.S. (23 Wall.) 458 (1875), and *Continental Grain Co.* v. *Barge FBL-585*, 364 U.S. 19 (1960). Contrary to petitioner's contentions, however, those decisions did not jettison the firmly established general rule that judicial control of the *res* is a prerequisite to the exercise of *in rem* jurisdiction. That rule retains its vitality and continues to be applied by the federal courts in *in rem* actions.[3]

In *The Rio Grande*, the Court addressed the question reserved in *The Brig Ann*: whether a fraudulent or improper removal of the *res* deprives the court of jurisdiction. In *The Rio Grande*, an *in rem* action was brought in federal district court in Alabama against a vessel for the cost of repairs. The district court entered judgment for the vessel; the plaintiffs

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[3] See, *e.g.*, *United States* v. *$29,959 U.S. Currency*, 931 F.2d 549, 551 (9th Cir. 1991); *United States* v. *Tit's Cocktail Lounge*, 873 F.2d 141, 143 (7th Cir. 1989); *United States* v. *One Lear Jet Aircraft*, 836 F.2d 1571 (11th Cir.) (en banc), cert. denied, 487 U.S. 1204 (1988); *United States* v. *$79,000 in U.S. Currency*, 801 F.2d 738, 739 (5th Cir. 1986); *United States* v. *66 Pieces of Jade & Gold Jewelry*, 760 F.2d 970, 973 (9th Cir. 1985); *L.B. Harvey Marine, Inc.* v. *M/V "River Arc"*, 712 F.2d 458 (11th Cir. 1983); *Taylor* v. *Tracor Marine, Inc.*, 683 F.2d 1361 (11th Cir. 1982); *Bank of New Orleans & Trust Co.* v. *Marine Credit Corp.*, 583 F.2d 1063 (8thh Cir. 1978); *American Bank of Wage Claims* v. *Registry of the District Court of Guam*, 431 F.2d 1215, 1218-1219 (9th Cir. 1970); *Parks* v. *B.F. Leaman & Sons, Inc.*, 279 F.2d 529, 532 (5th Cir. 1960). But see *United States* v. *$12,390*, 956 F.2d 801 (8th Cir. 1992); *United States* v. *One Lot of 25,721 in Currency*, 938 F.2d 1417, 1419 (1st Cir. 1991); *United States* v. *$1,322,242.58*, 938 F.2d 433, 437-438 (3d Cir. 1991) (declining to apply traditional rule where the *res* is money); *United States* v. *$95,945.18*, 913 F.2d 1106 (4th Cir. 1990); *United States* v. *Aiello*, 912 F.2d 4 (2d Cir. 1990), cert. denied, 111 S. Ct. 757 (1991).

took the necessary steps (including the posting of supersedeas bonds) to perfect an appeal. Due to a clerical error, however, the United States Marshal, who had custody of the ship, released it to its owners, who "immediately * * * went off with her." 90 U.S. (23 Wall.) at 461. The circuit court nevertheless heard the appeal and entered judgment for the plaintiffs. The plaintiffs soon learned that the vessel was in New Orleans, where they had the vessel arrested for a second time. The Court held that the circuit court in Alabama had jurisdiction over the appeal, because "a valid seizure and actual control of the *res* by the marshal gives jurisdiction of the subject-matter, and * * * an accidental or fraudulent or improper removal of it from his custody * * * does not destroy jurisdiction." *Id.* at 465.

The Court's decision in *The Rio Grande* recognized an exception to the general rules of *in rem* jurisdiction that applies when the *res* is accidentally or fraudulently removed from the court's control. In recognizing that exception, the Court did not imply that it was rejecting the general rule that jurisdiction in an *in rem* action rests on the court's continuing control of the *res*. On the contrary, the Court noted that the narrow question presented in *The Rio Grande* had been expressly reserved in *The Brig Ann*, and reaffirmed the holding of *The Brig Ann* that "the legal effect" of "a voluntary abandonment and release of the property seized [is] to purge away all the prior rights acquired by the seizure." 90 U.S. (23 Wall.) at 464 (quoting 13 U.S. (9 Cranch) at 291).[4] Because the government's removal of the *res*

[4] Justice Hunt's opinion for the Court in *The Rio Grande* erroneously attributes the Court's opinion in *The Brig Ann* to Chief Justice Marshall. See 90 U.S. (23 Wall.) at 464.

in this case was not accidental, fraudulent, or otherwise improper, J.A. 37, *The Rio Grande* does not support petitioner's position.

The Court's decision in *Continental Grain Co.* v. *Barge FBL-585*, *supra*, also provides no support for petitioner. In that case, a cargo owner filed a single action asserting essentially identical claims against a vessel *in rem* and against the vessel's owner *in personam*. The Court held that the entire action could be transferred from a district court in Louisiana to a district court in Tennessee under the *forum non conveniens* statute, 28 U.S.C. 1404(a). As the case came to the Court, it was undisputed that a transfer was in the interest of justice, and that the vessel owner was subject to suit *in personam* in the Tennessee court. The Court rejected the argument that the *in rem* claim could not be transferred to Tennessee because the vessel was located in Louisiana at the time the action was filed. The Court acknowledged the "long-standing admiralty fiction that a vessel may be assumed to be a person for the purpose of filing a lawsuit and enforcing a judgment." 364 U.S. at 22-23. The Court noted, however, that "[t]he fiction * * * has not been without its critics," and declined to "transplant" the fiction to the "context of *forum non conveniens*." [5] *Id.* at 23. The Court based its decision

[5] The Court noted that a lower court opinion had referred to the fiction that a vessel is a person as " 'archaic,' 'an animistic survival from remote times,' 'irrational' and 'atavistic.' " 364 U.S. at 23 (quoting *The Carlotta*, 48 F.2d 110, 112 (2d Cir. 1931)). But the Court commented that this criticism "[p]erhaps is going too far," because "[a] purpose of the fiction, among others, has been to allow actions against ships where a person owning the ship could not be reached, and it can be very useful for this purpose still." 364 U.S. at 23.

on its conclusion that the *in rem* and *in personam* claims were "inseparable parts of one single 'civil action.'" *Id.* at 27. The Court observed that "the grain company's suit against the barge and its suit against the owner are in the same complaint for the loss of the same cargo in the same sinking of the same barge producing the same damages. * * * The crucial issues about fault and damages suffered were identical, whether considered as a claim against the ship or its owner." *Id.* at 22, 26.

The Court's decision in *Continental Grain* did not purport to overrule the established principle that the presence of the *res* is a jurisdictional prerequisite in *in rem* actions. Instead, the Court declined to apply that rule expansively, in a case that involved overlapping *in rem* and *in personam* claims, to defeat the purpose of the *forum non conveniens* statute. This case, unlike *Continental Grain*, involves only an *in rem* claim. Because forfeiture proceedings, by long tradition, are actions *in rem*, this case presents no question of "transplanting" *in rem* jurisdictional principles to a novel context. In *Continental Grain*, moreover, a court retained control over the *res* throughout the proceedings, and the vessel owner consented to the transfer and agreed to pay any judgment rendered against the vessel. See 364 U.S. at 27 (opinion of Frankfurter, J.). In this case, in contrast, no court has control over the *res*, and the United States has not consented—and, in the absence of an appropriation by Congress, could not consent, see pages 30-34, *infra*—to pay petitioner's claim from the Treasury if petitioner were to succeed on appeal.[6]

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[6] There is no basis for petitioner's contention (Pet. Br. 14-16) that the ordinary rules of *in rem* jurisdiction do not apply if the *res* at issue is money rather than tangible property. It is common practice in *in rem* proceedings to substitute money

3. "[W]here a common-law principle is well established, * * * the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'" *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 111 S. Ct. 2166, 2169-2170 (1991) (quoting *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952)). See also *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 501 (1986). As we have shown, the general rule that *in rem* jurisdiction rests on the court's continued control of the *res* is a firmly established legal principle. Congress's forfeiture statutes not only fail to evince a purpose to reject that rule, they reinforce the conclusion that Congress intended the rule to apply unless altered by statute.

For example, the provision of the Judiciary Act of 1789 construed in *The Brig Ann* conferred on the district courts jurisdiction "of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made * * * within their respective districts as well as upon the high seas." Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 77. See 13 U.S. (9 Cranch) at 291. Thus, as early as the First Judiciary Act, Congress recognized that

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for a tangible *res*. See *American Bank of Wage Claims* v. *Registry of the District Court of Guam*, 431 F.2d 1215, 1218 (9th Cir. 1970). Although money is fungible, the court's *in rem* jurisdiction is not destroyed, nor is the action transformed into an *in personam* proceeding. See *United States* v. *$57,480.05 U.S. Currency & Other Coins*, 722 F.2d 1457, 1459 (9th Cir.) ("It does not follow * * * that once the substitute funds are disbursed pursuant to the judgment of the court, the court retains power to re-create the *res* if the judgment is reversed. The rule is quite the contrary."), cert. denied, 469 U.S. 916 (1984).

a district court's *in rem* jurisdiction depended on seizure of the *res* "within [the] district." Similarly, in 1819 Congress passed a statute providing that any vessel used in "any piratical aggression * * * shall be captured and brought into any port of the United States" and forfeited after a trial "in any court having admiralty jurisdiction, which shall be holden for the district into which the captured vessel shall be brought." Act of Mar. 3, 1819, ch. 77, § 4, 3 Stat. 513. See *The Palmyra*, 25 U.S. (12 Wheat.) 1, 7-8 (1827).

Petitioner contends (Pet. Br. 8) that "whatever continued validity the 'ship personification' fiction may have in admiralty law, the Government's attempt to apply it, as a rationale to dismiss appeals in civil forfeiture cases, should be rejected." But as we have explained, p. 10, *supra*, Congress has expressly provided that the rules applicable to admiralty *in rem* actions shall apply in forfeiture proceedings, and has modified those procedures when it saw fit to do so. See 28 U.S.C. 2461(b); 21 U.S.C. 881(b).[7] Accordingly, petitioner's contention is properly addressed to Congress rather than to this Court.

Admiralty rules have long reflected the basic principle that judicial control of the *res* is a jurisdictional prerequisite to the maintenance of an action *in rem*. The 1844 rules of practice in admiralty and maritime cases required that an *in rem* action be

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[7] Earlier forfeiture statutes likewise applied the procedural rules of admiralty *in rem* proceedings. See, *e.g.*, Act of July 17, 1862, ch. 195, § 7, 12 Stat. 587, 591 ("proceedings in rem shall be instituted in the name of the United States * * * which proceedings shall conform as nearly as may be to proceedings in admiralty or revenue cases."). See *Knote* v. *United States*, 95 U.S. 149 (1877).

initiated by arrest of "ship, goods, or other thing to be arrested" (Rule IX), and that a libel initiating a forfeiture action "state the place of seizure" (Rule XXII). See *Miller* v. *United States*, 78 U.S. (11 Wall.) 268, 294 (1871). The 1920 Admiralty Rules, which replaced the 1844 rules, were to the same effect. See Rules 10, 21; *Ex parte Peru*, 318 U.S. 578, 587 (1943).[8]

The current version of the special rules applicable to *in rem* proceedings is set out in the Supplemental Rules for Certain Admiralty and Maritime Claims. Supplemental Rule C(2) provides that the complaint in an *in rem* action

> shall describe * * * the property that is the subject of the action and state that it is within the district or will be during the pendency of the action. In actions for the enforcement of forfeitures for violation of any statute of the United States the complaint shall state the place of [the] seizure.

Rule C(3) provides:

> In actions by the United States for forfeitures for federal statutory violations, the clerk, upon filing of the complaint, shall forthwith issue a summons and warrant for the arrest of the vessel or other property.

In addition, Supplemental Rule E(3) limits service of process in *in rem* actions to the district where the action is commenced. Rule E(4)(b) provides that "[i]f tangible property is to be * * * arrested, the marshal shall take it into the marshal's possession for safe custody," or if taking actual possession

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[8] The Admiralty Rules of 1844 and 1920 are set out in 7A J. Moore & A. Palaez, *Moore's Federal Practice* ¶ .30, at 229, 236 (2d ed. 1988).

of the property is impracticable, "shall * * * affix[] a copy [of the process] in a conspicuous place." "If intangible property is to be * * * arrested," the marshal is required to serve the process on the obligor. *Ibid.* Under Supplemental Rule E(5)(a), the owner of the *res* generally may obtain the release of the property by posting a bond "sufficient to cover the amount of the plaintiff's claim fairly stated with accrued interest and costs." The bond serves as a substitute for the vessel or other *res.* See *The Palmyra*, 25 U.S. (12 Wheat.) 1, 10 (1827); *The "Wanata"*, 95 U.S. 600, 611 (1877); G. Gilmore & C. Black, *supra*, § 9-89, at 799.[9] Finally, Rule E(8) provides that a claimant may enter a restricted appearance to defend against an *in rem* claim, and that such an appearance "shall not constitute an appearance for the purposes of any other claim with respect to which such process is not available or has not been served."

Each of these rules reflects the underlying principle that the defendant in an *in rem* action is the *res*, and that therefore the court's *in rem* jurisdiction depends on its continuing control of the *res.* For example, if the court were not required to exert control over the *res*, it would not be necessary to ascertain that the property was within the district, nor would it be necessary to "arrest" the *res.* And if continuing judicial control were not necessary to support jurisdiction, the owner of the *res* would not be required to post a bond as a substitute *res* to obtain release of the *res.*

When Congress has sought to make an exception to the traditional rule that continuing control of the

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[9] A claimant in a forfeiture proceeding is not entitled to obtain release of the property by posting a bond. Rule E(5)(a).

*res* is a prerequisite to *in rem* jurisdiction, it has done so expressly. For example, the Federal Food, Drug, and Cosmetic Act provides that proceedings for the forfeiture of adulterated or misbranded foods, drugs, and cosmetics must be commenced "in any district court * * * within the jurisdiction of which the article is found." 21 U.S.C. 334(a). This is the traditional rule. The statute goes on to provide, however, that a forfeiture action may be moved to a different district in certain circumstances. *Ibid.*

Similarly, the customs laws have long provided that items seized under those laws "shall be placed and remain in the custody of the appropriate customs officer *for the district in which the seizure was made* to await disposition according to law." 19 U.S.C. 1605 (emphasis added). This reflects the historic rule linking jurisdiction to seizure and custody of the *res* in the district. Section 1605 was amended in 1954, however, to provide that

> [p]ending such disposition, the property shall be stored in such place as, in the customs officer's opinion, is most convenient and appropriate with due regard to the expense involved, whether or not such place of storage is within the judicial district or the customs collection district in which the property was seized; and storage of the property outside the judicial district or customs collection district in which it was seized shall in no way affect the jurisdiction of the court which would otherwise have jurisdiction over such property.

The legislative history of the amendment cites *The Brig Ann* and *The Rio Grande* for the rule that seized items must "remain in the judicial district of seizure in order that the district court may have jurisdiction

when condemnation proceedings are instituted." S. Rep. No. 2326, 83d Cong., 2d Sess. 7 (1954). Congress plainly understood that, in light of the traditional rule, express legislative alteration of that rule was necessary if the district courts were to retain jurisdiction after transfer of the seized items. *Ibid.*; H.R. Rep. No. 2453, 83d Cong., 2d Sess. 10-11 (1954). If petitioner's view of the law is correct, Congress's understanding was quite wrong, and its amendment was wholly gratuitous. See *One Lear Jet*, 836 F.2d at 1575.

Similarly, 21 U.S.C. 881—the forfeiture statute at issue in this case—provides that "[w]henever property is seized under any of the provisions of the subchapter, the Attorney General may * * * remove the property to a place designated by him." 21 U.S.C. 881(c)(2). Again, if petitioner's view of the law is correct, that provision was unnecessary, because the property could be removed from the district without depriving the court of jurisdiction.[10] The legislative history of the 1984 amendments to 21 U.S.C. 881 clearly indicates that Congress understood that such provisions are necessary to modify the traditional rules of *in rem* jurisdiction.

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[10] Petitioner did not argue below and does not contend here that 21 U.S.C. 881(c) confers jurisdiction on the court of appeals after the *res* has left the court's control. In any event, Section 881(c) has no such effect. That provision grants custody of the *res* to the Attorney General "subject * * * to the orders and decrees of the court or the official having jurisdiction thereof," and provides for "disposition [of the property] in accordance with law." 21 U.S.C. 881(c). In this case, the district court entered a final judgment of forfeiture, and the property was disposed of in accordance with law by being deposited in the United States Treasury. Consequently, the court no longer has control of the *res* or jurisdiction.

> A civil forfeiture is commenced by the government's seizure of the asset. * * * Since civil forfeiture is an *in rem* proceeding, the forfeiture case must be brought in the judicial district in which the property is located. The property is the defendant in the case.

S. Rep. No. 225, 98th Cong., 2d Sess. 193 (1984).

In addition, Congress is considering legislation that would preserve the court's jurisdiction in civil forfeiture cases after the removal of the *res*. On November 21, 1991, the Senate passed S.543, which provides in part as follows:

> In any case in which a final order disposing of property in a civil forfeiture action or proceeding is appealed, removal of the property by the prevailing party shall not deprive the court of jurisdiction. Upon motion of the appealing party, the district court or the court of appeals shall issue any order necessary to preserve the right of the appealing party to the full value of the property at issue, including a stay of the judgment of the district court pending appeal or requiring the prevailing party to post an appeal bond.

See 137 Cong. Rec. S17,482-17,483 (daily ed.); *id.* at S16,643 (daily ed. Nov. 13, 1991). The House of Representatives failed to pass this legislation before Congress adjourned in the fall of 1991, but it is currently pending in identical form as part of S.1665. Again, Congress would have no reason to consider such legislation if it did not regard the continuing presence of the *res* as a prerequisite to jurisdiction,

just as it did in 1954 when it amended 19 U.S.C. 1605.[11]

It bears repeating that the rule at issue in this case is a rule of jurisdiction. Federal courts are courts of limited jurisdiction; they have only such jurisdiction as is authorized by Article III of the Constitution and the statutes enacted by Congress. Those who invoke the jurisdiction of a federal court—including a federal appellate court—have the burden of establishing it. See *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). The effect of a decision in petitioner's favor would be to expand the scope of federal jurisdiction in forfeiture proceedings by cutting the court's jurisdiction loose from its traditional *in rem* moorings. Even if this Court has power to expand federal jurisdiction by modifying long established jurisdictional rules, it would be unwise to exercise that power. Congress has legislated in this area on the assumption that the traditional jurisdictional rules are valid. Accordingly, any change in the jurisdictional rules should be made by Congress rather than this Court. Cf. *Omni Capital Int'l, Ltd.* v. *Rudolph Wolff & Co.*, 484 U.S. 97, 108-109 (1987) (concluding that it is unclear whether

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[11] In contrast to civil forfeitures under 21 U.S.C. 881, Congress has expressly provided that in criminal forfeiture proceedings under 21 U.S.C. 853, "[t]he district courts of the United States shall have jurisdiction to enter orders * * * without regard to the location of any property which may be subject to forfeiture under this section." 21 U.S.C. 853(*l*). The absence of any corresponding provision in 21 U.S.C. 881 (which was amended at the same time that Congress enacted 21 U.S.C. 853(*l*)), reinforces the conclusion Congress did not intend to alter the traditional principle that *in rem* jurisdiction in civil forfeiture proceedings rests on continued control of the *res*.

Court has authority to alter rules authorizing service of process, but that in any event it would be unwise to do so where Congress has assumed that the courts lack such authority).

4. a. Any departure from traditional principles of *in rem* jurisdiction would raise serious concerns under Article III of the Constitution. The traditional rule requiring that the court in an *in rem* action retain control over the *res* to retain jurisdiction ensures that the court will be able to enforce a subsequent judgment. The relief that a court orders in an *in rem* action is disposition of the *res*; once the court loses control of the *res*, it *ipso facto* loses its ability to order relief. In historic admiralty terms, once the ship has sailed from port, the court can no longer control the disposition of the ship. Any suggestion that the court can afford relief apart from disposition of the *res* obliterates the distinction between *in rem* and *in personam* actions. Here, the court cannot order the United States to pay petitioner money, because—quite apart from sovereign immunity and Appropriations Clause concerns, see pp. 30-34, 36-38, *infra*—this is not an *in personam* action. The court, when it controlled the *res*, *could* order appropriate disposition of the *res*—*i.e.*, the money—but it lost its ability to do so when the *res* left the court's control.

In this respect the traditional rule implicates the same sort of Article III case or controversy concerns underlying mootness principles. See *Deakins* v. *Monaghan*, 484 U.S. 193, 199 (1988). A ruling by the court of appeals that the *res* be turned over to petitioner would be a wholly advisory opinion, because the *res* is no longer subject to the control of the court. Under Article III, "a federal court has neither the power to render advisory opinions nor 'to decide ques-

tions that cannot affect the rights of litigants in the case before them.'" *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975) (quoting *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971)). Just as a federal court cannot proceed with a case once the case has become moot, so too a federal court in an *in rem* action cannot proceed to consider the rights of litigants to a *res* that is no longer before the court. And because control of the *res* is crucial to the existence of an ongoing case or controversy in an *in rem* action, that control must be maintained at all stages of the action. See *Deakins* v. *Monaghan*, 484 U.S. at 199; *Steffel* v. *Thompson*, 415 U.S. 452, 459 n.10 (1974) ("The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed."); *United States* v. *Certain Real & Personal Property*, 943 F.2d 1292, 1296 (11th Cir. 1991) (civil forfeiture proceeding is moot when court no longer has "the ability to grant the claimant her requested remedy, the return of her * * * interest in the property"); *Teyseer Cement Co.* v. *Halla Maritime Corp.*, 794 F.2d 472, 475 (9th Cir. 1986) (removal of *res* moots *in rem* action, because court "cannot take jurisdiction over a claim as to which no effective relief can be granted").[12]

The traditional *in rem* rule also implicates Article III concerns of the kind that underlie principles of standing. To establish a case or controversy under

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[12] Contrary to petitioner's contention (Pet. Br. 7 n.1), the requirement that a court have control of the *res* in an *in rem* action is not analogous to the amount in controversy requirement in diversity actions. Because a judgment *in rem* must be satisfied out of the *res*, continued control of the *res* is necessary to ensure that the judgment will be satisfied.

Article III, a plaintiff must show an injury to himself that "is likely to be redressed by a favorable decision." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976). "The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Art. III requirement." *Allen* v. *Wright*, 468 U.S. 737, 766 (1984) (quoting *Simon*, 426 U.S. at 39). See also *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986). "[I]t [is] not enough that a dispute was very much alive when suit was filed * * *. The parties must continue to have a ' "personal stake in the outcome" ' of the lawsuit." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477-478 (1990), quoting *Los Angeles* v. *Lyons*, 461 U.S. 95, 101 (1983), quoting, in turn, *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). See also *Lujan* v. *Defenders of Wildlife*, No. 90-1424 (June 12, 1992), slip op. 4.

In *Gollust* v. *Mendell*, 111 S. Ct. 2173, 2180 (1991), the Court concluded that allowing a plaintiff to maintain an action "after he had lost any financial interest in its outcome" would raise "serious constitutional doubt whether that plaintiff could demonstrate the standing required by Article III's case or controversy limitation on federal court jurisdiction." 111 S. Ct. at 2180. Similar concerns are raised by allowing a claimant in an *in rem* action to continue to litigate a claim to a *res* that is no longer within the court's control. The court is not in a position to direct that the *res* be used to satisfy a judgment for petitioner; consequently, petitioner does not "stand to profit" from a decision in its favor.

It is no answer to contend that the court may simply enter a judgment against the United States for the value of the *res*, and thereby afford the claimant relief. That would obliterate the distinction between *in rem* and *in personam* jurisdiction (see pp. 35-36, *infra*), would violate principles of sovereign immunity establishing that the United States does not consent to suit *in personam* by bringing a proceeding *in rem* (see pp. 36-38, *infra*), and—as we now discuss—would contravene the Appropriations Clause.[13]

b. Departure from established *in rem* principles would raise concerns under the Appropriations Clause. More than a month after the district court entered final judgment against petitioner, the United States Marshal transferred the proceeds of the sale of the residence on Miraflores Avenue to the Assets Forfeiture Fund in the United States Treasury. See J.A. 25-28 & n.1. As noted, the district court no longer controls any *res* that it could order released to petitioner if petitioner were to prevail in this *in rem* action on appeal. Any order in petitioner's favor would therefore require the government to disburse funds from the Treasury. Because Congress has not provided that funds may be paid out of the Treasury

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[13] These concerns would be mitigated if there were a substantial likelihood that a judgment could be satisfied even though the court has lost control of the *res*. In *Continental Grain*, for example, there was no doubt that the plaintiff could recover on an essentially identical *in personam* claim. And in *The Rio Grande*, the plaintiff was able to execute on the judgment by re-arresting the *res*. That is not possible in this case, because the *res* has been deposited in the Treasury and Congress has not appropriated money to pay a judgment for petitioner. See pp. 30-34, *infra*.

in these circumstances, any payment to petitioner is forbidden by the Appropriations Clause.

The Appropriations Clause of the Constitution, Art. I, § 9, Cl. 7, provides in unambiguous terms that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." In *Office of Personnel Management* v. *Richmond*, 110 S. Ct. 2465, 2471 (1990), this Court recognized that "the Clause provides an explicit rule of decision: the payment of money from the Treasury must be authorized by statute." The Court explained that the Appropriations Clause "assure[s] that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good." *Id.* at 2473. See also *Reeside* v. *Walker*, 52 U.S. (11 How.) 272, 291 (1851); *Rochester Pure Waters Dist.* v. *EPA*, 960 F.2d 180 (D.C. Cir. 1992); 2 J. Story, *Commentaries on the Constitution of the United States* § 1348 (3d ed. 1858) ("As all the taxes raised from the people, *as well as the revenues arising from other sources*, are to be applied to the discharge of the expenses and debts, and other engagements of the government, it is highly proper, that congress should possess the power to decide how and when any money should be applied for these purposes.") (emphasis added).

In *Knote* v. *United States*, 95 U.S. 149 (1877), the Court held that the President had no power to order the Treasury to refund from the Treasury the proceeds from the sale of property forfeited by a person convicted of treason. The Court reasoned, in language applicable to this case, that "if the proceeds have been paid into the treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress." *Id.* at 154.

Thus, when funds obtained by forfeiture are deposited into the Treasury, payment from those funds is barred by the Appropriations Clause absent congressional authorization to make the payment at issue. As this Court recognized more recently in *United States* v. *Nordic Village, Inc.*, 112 S. Ct. at 1017, "[a] suit for payment of funds from the Treasury is quite different from a suit for the return of tangible property in which the debtor retained ownership."[14]

"Where Congress has addressed the subject * * * and authorized expenditures when a condition is met, the clear implication is that where the condition is not met, the expenditure is not authorized." *United States* v. *MacCollom*, 426 U.S. 317, 321 (1976) (plurality opinion). See also *OPM* v. *Richmond*, 110 S. Ct. at 2475 ("funds may be paid out only on the basis

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[14] In *United States* v. *$1,322,242.58*, 938 F.2d 433, 437-438 (3d Cir. 1991), the court of appeals exhibited some confusion caused by the fact that when money is seized under 21 U.S.C. 881, it is frequently held in a special Department of Justice account, known as the Seized Asset Deposit Fund, pending a final order of the district court. The purpose of the Seized Asset Deposit Fund, which was established pursuant to the Attorney General's authority under 21 U.S.C. 881(c)(2), is to safeguard money that is subject to a forfeiture proceeding while the proceeding is pending. Money in the Seized Asset Deposit Fund is not public money. Separate sub-accounts are maintained by the United States Marshals in each judicial district. The marshals maintain control over the assets in their sub-accounts, and can withdraw money from their sub-accounts pursuant to court order. In contrast, funds that have been deposited in the Assets Forfeiture Fund are public monies that are not subject to the control of the courts. See 28 U.S.C. 524(c). Petitioner's argument that the court in this *in rem* action could order payment from the Treasury ignores this key distinction.

of a judgment based on a substantive right to compensation based on the express terms of a specific statute"). Under 21 U.S.C. 881(e)(2)(A), the proceeds from any sale of forfeited property can be used only for two specified purposes: payment of the expenses of the seizure and sale and payments to informants. The Attorney General is required to "forward to the Treasurer of the United States, for deposit in accordance with section 524(c) of Title 28, any amounts * * * remaining after payment of the expenses provided in subparagraph (A)." 21 U.S.C. 881(e)(2)(B).

Section 524(c) of Title 28, in turn, authorizes expenditures from the Assets Forfeiture Fund only for specified purposes. Section 524(c) provides, in part:

> There is established *in the United States Treasury* a special fund to be known as the Department of Justice Assets Forfeiture Fund * * * which shall be available to the Attorney General without fiscal year limitation for the following purposes of the Department of Justice—
>
> * * * * *
>
> (D) the compromise and payment of valid liens and mortgages against property that has been forfeited pursuant to any law enforced or administered by the Department of Justice, subject to the discretion of the Attorney General to determine the validity of any such lien or mortgage and the amount of payment to be made.
>
> (E) disbursements authorized in connection with remission or mitigation procedures relating to property forfeited under any law enforced or administered by the Department of Justice.

28 U.S.C. 524(c)(1)(D) and (E) (emphasis added).[15]

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[15] Procedures for administrative remission and mitigation of civil forfeitures are set out at 28 C.F.R. Pt. 9.

There is no question that the Appropriations Clause applies to monies in the Assets Forfeiture Fund. Congress expressly established the Fund "in the United States Treasury," and provided that amounts for paying certain expenses "shall be specified in appropriations acts." 28 U.S.C. 524(c). In addition, it is clear that Section 524(c) does not authorize payment of a judgment for petitioner in the circumstances of this case. Instead, Congress has authorized such payments only pursuant to administrative determinations made by the Attorney General. In the absence of an express authorization from Congress to pay petitioner from the Treasury, the Appropriations Clause bars petitioners' appeal. See *United States* v. *$57,480.05 United States Currency*, 722 F.2d 1457, 1459 (9th Cir.), cert. denied, 469 U.S. 916 (1984).[16]

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[16] Petitioner cannot avail itself of 31 U.S.C. 1304, the general appropriation for payment of judgments against the United States. Section 1304 "does not create an all-purpose fund for judicial disbursement. * * * Rather, funds may be paid out only on the basis of a judgment *based on a substantive right to compensation based on the express terms of a specific statute.*" *OPM* v. *Richmond*, 110 S. Ct. at 2475 (emphasis added). See *Trout* v. *Garrett*, 891 F.2d 332, 335 (D.C. Cir. 1989) ("The judgment fund legislation * * * authorizes no claims for relief. It is auxiliary legislation; its sole office is to furnish 'a mechanism for facilitating payment of judgments' rendered on claims authorized by *another* statute.") (quoting *Rosenfeld* v. *United States*, 859 F.2d 717, 727 (9th Cir. 1988)). Here, no statute gives petitioner a substantive right to compensation. On the contrary, the specific and detailed appropriations provisions of 28 U.S.C. 524(c) indicate that Congress "has considered and rejected the possibility of an additional exercise of its appropriation power" in this context. *OPM* v. *Richmond*, 110 S. Ct. at 2474. See *United States* v. *MacCollom*, 426 U.S. at 321.

### B. *The United States Does Not Submit to the* In Personam *Jurisdiction of the Court By Bringing An* In Rem *Forfeiture Proceeding.*

Petitioner contends (Pet. Br. 10-14) that the United States, by bringing an *in rem* action against the Miraflores Avenue property, has consented to the *in personam* jurisdiction of the district court. Accordingly, petitioner argues, the court retains *in personam* jurisdiction over the United States even though it no longer has control over the *res*. That argument is unpersuasive.

It is well settled that the existence of *in rem* and *in personam* jurisdiction turns not on whether the parties have invoked the judicial process, but on the substantive nature of their claims. In admiralty, *in rem* jurisdiction exists only if the claim at issue gives rise to a maritime lien. See G. Gilmore & C. Black, *supra*, § 1-12, at 35-36; *id.* § 9-19, at 622. To be sure, substantive admiralty law provides that "many transactions and occurrences give rise to both a personal liability and a maritime lien." *Id.* at 36. When a case involves overlapping *in rem* and *in personam* claims, there is some basis for allowing the court to retain jurisdiction even after the *res* is removed from the district. See *Inland Credit Corp.* v. *M/T Bow Egret*, 552 F.2d 1148 (5th Cir. 1977). Cf. *Continental Grain Co.* v. *Barge FBL-585*, *supra*. But that basis for retaining jurisdiction is not present in this case, which involves only an *in rem* claim for civil forfeiture. See *United States* v. *One Lear Jet Aircraft*, 836 F.2d 1571, 1575-1577 ((11th Cir.) (en banc), cert. denied, 487 U.S. 1204 (1988); *Martin* v. *The Bud*, 172 F.2d 295, 297 (9th Cir. 1949).[17]

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[17] Contrary to petitioner's contention (Pet. Br. 10), *Adam* v. *Saenger*, 303 U.S. 59 (1938), does not stand for the proposi-

If the decision to litigate an *in rem* claim automatically conferred *in personam* jurisdiction on the court, the fundamental distinction between actions *in rem* and actions *in personam* would be obliterated. The court could enter judgment against the participants themselves, rather than the *res*, and the amount of the judgment would not be limited to the value of the *res*. Moreover, the Supplemental Rules For Certain Admiralty and Maritime Claims expressly allow a claimant in an *in rem* action to contest the action without "appear[ing] for the purposes of any other claim with respect to which such process is not available or has not been served." Rule E(8).[18]

Even if it were generally true that the plaintiff in an *in rem* proceeding submits to the *in personam* jurisdiction of the court, that rule would not apply

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tion that the plaintiff in an *in rem* action is subject to the *in personam* jurisdiction of the court. That case held only that "[t]here is nothing in the Fourteenth Amendment to prevent a state from adopting a procedure by which a judgment *in personam* may be rendered in a cross-action against a plaintiff in its courts." *Id.* at 67.

[18] Petitioner suggests (Pet. Br. 12-14) that recent decisions of this Court have eroded the distinction between *in rem* and *in personam* jurisdiction. In *Shaffer* v. *Heitner*, 433 U.S. 186 (1977), the Court held that the "minimum contacts" analysis of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), applies to all assertions of state court jurisdiction, including *in rem* jurisdiction. And in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the Court held that notice by publication is constitutionally inadequate if it is "not reasonably calculated to reach those who could easily be informed by other means at hand." *Id.* at 319. *Shaffer* and *Mullane* merely extended the requirements of the Due Process Clause to actions *in rem*; they did not, as petitioner suggests, dissolve the distinction between actions *in rem* and actions *in personam*. Petitioner raises no Due Process claim in this case.

to forfeiture proceedings brought by the United States. "[T]he United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction.'" *United States* v. *Testan*, 424 U.S. 392, 399 (1976) (quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941)). Waivers of sovereign immunity are strictly construed in favor of the United States. *Ardestani* v. *INS*, 112 S. Ct. 515, 520 (1991); *Library of Congress* v. *Shaw*, 478 U.S. 310, 318 (1986). In particular, "[a] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Irwin* v. *Veterans Admin.*, 111 S. Ct. 453, 457 (1990), quoting *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980), quoting, in turn, *United States* v. *King*, 395 U.S. 1, 4 (1969). No provision of 21 U.S.C. 881 waives the government's immunity from suit. Nor does any other statute provide that the United States submits to a court's *in personam* jurisdiction by filing an *in rem* forfeiture proceeding.

This Court recently rejected the contention that the "court's *in rem* jurisdiction overrides sovereign immunity." *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1017 (1992). The Court observed that it has "never applied an *in rem* exception to the sovereign-immunity bar against monetary recovery," and expressly concluded that "[a] suit for payment of funds from the Treasury is quite different from a suit for the return of tangible property in which the debtor retained ownership." *Ibid.* The Court noted that decisions applying ordinary principles of the law of trusts are irrelevant when the party at issue is the United States. In addition, the Court observed that *Bull* v. *United States*, 295 U.S. 247 (1935)—a case that did involve the government—

"concern[ed] equitable recoupment, a doctrine that has been substantially narrowed by later cases" and has no application in the context of *in rem* proceedings. 112 S. Ct. at 1017 (citing *United States* v. *Dalm*, 494 U.S. 596, 608 (1990)). See also *United States* v. *Shaw*, 309 U.S. 495 (1940) (United States did not waive its sovereign immunity to a cross-claim by the estate by filing a claim against a decedent's estate in *in rem* proceeding in state court).

### C. *Neither the Federal Rules of Appellate Procedure Nor the Venue Provisions of 21 U.S.C. 881 Confer Jurisdiction on the Court of Appeals.*

1. There is no force to petitioner's contention (Pet. Br. 6) that the court of appeals' dismissal for want of jurisdiction was contrary to Federal Rule of Appellate Procedure 3(a). The Federal Rules of Appellate Procedure themselves specify that the Rules "shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law." Fed. R. App. P. 1(b). Rule 3(a) provides, in relevant part, that "[f]ailure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal." Although Rule 3(a) provides that the filing of a timely notice of appeal is a jurisdictional prerequisite to review by the court of appeals, see *United States* v. *Robinson*, 361 U.S. 220, 224 (1960), that is not the only jurisdictional prerequisite. If the district court lacked jurisdiction, the court of appeals has "jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *Bender* v. *Williamsport Area School District*, 475 U.S. at 541 (quoting *United States* v. *Corrick*, 298 U.S. 435, 440 (1936)). Similarly, if the district court no longer has *in rem*

jurisdiction because it has released the *res* from its control, it follows that the court of appeals cannot exercise *in rem* jurisdiction.[19]

2. Petitioner also contends (Pet. Br. 16-19) that 21 U.S.C. 881(j) confers jurisdiction on the court of appeals. Section 881(j) is entitled "Venue," and provides:

> In addition to the venue provided for in section 1395 of title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

By its plain terms, Section 881(j) allows a forfeiture proceeding to be "brought" outside the district where the property is located only "in the case of property of a defendant charged with a violation that is the basis for forfeiture." At the time the government brought this forfeiture proceeding, no criminal prosecution was pending against Indalecio Iglesias, the owner of the property. Consequently, Section 881(j) simply does not apply in this case. Even in cases in which Section 881(j) applies, moreover, the government may elect to proceed under 28 U.S.C. 1395, which provides that a civil forfeiture proceeding may be prosecuted in any district where the property is found or into which the property is brought. If the

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[19] That is particularly so where, as here, a judgment on the merits in petitioner's favor would require payment of money from the Treasury in violation of the Appropriations Clause. See pp. 30-34, *supra*.

government chooses to proceed under 28 U.S.C. 1395, the property owner is not entitled to insist that the government make a different choice.

In any event, Section 881(j) bears only on venue; it does not concern the court's jurisdiction. As this Court has explained, jurisdiction goes to the court's power to hear an action, while venue relates only to the locality of a suit among courts with jurisdiction to hear it. See *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167-168 (1939); see also 15 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3801, at 4-6 (2d ed. 1986) ("distinction between the court's power to adjudicate and the place where that authority may be exercised must always be recognized"). A statute such as Section 881(j) that defines the venue for an action cannot expand the jurisdiction of a court to hear an action.[20]

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[20] The legislative history of Section 881(j) indicates that the provision was intended to eliminate the need to conduct separate civil forfeiture proceedings in cases in which the property of a criminal defendant is located in several districts. See S. Rep. No. 225, 98th Cong., 2d Sess. 210 (1984) ("In cases of large drug trafficking operations, forfeitable property may be located in several districts. Thus, separate but parallel civil actions must be filed in each district in which property is located."). If the government chooses to avail itself of the venue provisions of 21 U.S.C. 881(j), the property must be seized pursuant to an arrest warrant issued by the court in the district in which the property is located. See 21 U.S.C. 881(b). Under 21 U.S.C. 881(c), the property is deemed to be in the custody of the Attorney General, subject to the orders of the court, during the pendency of the action. The district court in which the owner is found or prosecuted thus has *in rem* jurisdiction, because (1) the property was seized pursuant to the Supplemental Rules For Certain Admiralty and Maritime Claims, and (2) the property remains subject to the control of the court. Once a final judgment of forfeiture is executed, however, the court no longer has control of the property and therefore no longer has *in rem* jurisdiction.

### D. *Requiring a Losing Claimant in a Forfeiture Action to Take Reasonable Steps to Preserve the Court's Jurisdiction on Appeal Is Not Unfair.*

Petitioner contends (Pet. Br. 19-22) that requiring a losing claimant in a civil forfeiture action to take steps to preserve the court's jurisdiction on appeal is unduly burdensome and unfair. Petitioner's policy arguments cannot affect the scope of the jurisdiction of the federal courts. In any event, petitioner's assertions of unfairness are greatly overstated.

After a district court enters a final judgment of forfeiture, the government is not permitted to remove the *res* from the court's jurisdiction until the losing claimant has had an opportunity to preserve the court's jurisdiction on appeal. Under Fed. R. Civ. P. 62(a), proceedings to enforce the judgment are automatically stayed for 10 days. Losing claimants are thus afforded an opportunity to review the district court's decision and take action to preserve the court's jurisdiction on appeal.

Petitioner asserts (Pet. Br. 20-21) that it is unfair "to require a losing litigant objectively to decide whether an appeal is warranted in such a short time." Pet. Br. 21. But Rule 62(a) affords the same 10-day automatic stay to most losing parties. Indeed, some losing parties—notably, in actions in which an injunction is entered—are not entitled to any automatic stay. See Fed. R. Civ. P. 62(a). It is often the case that a losing party may suffer irreversible consequences if it fails to obtain a stay before the judgment is executed. The government, for example, routinely confronts that situation when it loses a case in district court under the Freedom of Information Act, 5 U.S.C. 552. See, *e.g.*, *Providence Journal Co.* v. *FBI*, 595 F.2d 889, 890 (1st Cir. 1979). In crimi-

nal cases, moreover—where the stakes may be much higher than in a civil proceeding—a defendant is allowed only 10 days in which to file a notice of appeal. Fed. R. App. P. 4(b). Consequently, there is no merit to petitioner's contention that it is unfair to require losing claimants in forfeiture proceedings to decide whether to appeal within 10 days.

In addition to the automatic 10-day stay, a losing claimant can obtain an automatic stay pending appeal by posting a supersedeas bond. See Fed. R. Civ. P. 62(d). Petitioner does not contend that it was unable to post a bond in this case, or that it is unduly burdensome to require claimants to post a bond if they can afford to do so. Instead, petitioner argues (Pet. Br. 19-20) that requiring losing claimants to post a bond "effectively limits the right to appeal forfeiture judgments to wealthy claimants." Pet. Br. 19. But a district court has discretion to enter a stay pending appeal without requiring the appellant to satisfy the supersedeas bond requirement of Fed. R. Civ. P. 62(d). See *Northern Indiana Public Serv. Co.* v. *Carbon County Coal Co.*, 799 F.2d 265, (7th Cir. 1986); *Olympia Equip. Leasing Co.* v. *Western Union Tel. Co.* 786 F.2d 794, 796 (7th Cir. 1986); *Federal Prescription Serv., Inc.* v. *American Pharmaceutical Ass'n*, 636 F.2d 755, 757-760 (D.C. Cir. 1980); 7 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 62.06 (2d ed. 1992). Indeed, the courts have so held in the context of civil forfeiture proceedings. *United States* v. *Certain Real and Personal Property*, 943 F.2d 1292, 1296 (11th Cir. 1991) ("bond requirement may be waived in a court's discretion"); *United States* v. *Tit's Cocktail Lounge*, 873 F.2d at 143 ("Upon motion to the district court, [the] bond requirement

may be waived in the court's discretion.").[21] If the district court refuses to stay its judgment pending appeal, a claimant may seek a stay from the court of appeals, see Fed. R. App. P. 8(a); Fed. R. Civ. P. 62(g), and from this Court, Sup. Ct. R. 23.4 ("The judge, court, or Justice granting an application for a stay pending review by this Court *may* condition the stay on the filing of a supersedeas bond."). Petitioner's assertion (Pet. Br. 19 n.3) that "there are apparently no courts which will dispense with a bond where posting a bond would render the party insolvent" is incorrect. Indeed, the very case that petitioner cites for that proposition, *Miami Int'l Realty Co.* v. *Paynter*, 807 F.2d 871, 874 (10th Cir. 1986), affirmed the district court's decision not to require the defendant to post a full bond because "he was financially unable to post a full bond and * * * execution on the judgment would place him in insolvency." See also *Federal Prescription Serv.*, 636 F.2d at 758 (citing authorities).

Finally, there is no basis for petitioner's assertion (Pet. Br. 21-22) that requiring losing claimants who

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[21] Petitioner asserts (Pet. Br. 19 n.3) that there are "contrary cases" collected in a footnote to the District of Columbia Circuit's *Federal Prescription Service* opinion. But one of the decisions of a court of appeals cited in that footnote held only that the district court erred in staying the execution of a money judgment for more than a year without attempting to justify its action. See *Geddes* v. *United Financial Group*, 559 F.2d 557, 560-561 (9th Cir. 1977). A second cited decision held that the district court did not err in holding a husband in contempt for failing to make court-ordered support payments after he failed to obtain a stay of the court's judgment pending appeal. *Gullet* v. *Gullet*, 174 F.2d 531, 533 (D.C. Cir. 1949). The third cited decision contains only a general statement that "bond securing payment of money judgment must be given, if * * * stay pending appeal is desired." *Fidelity & Deposit Co.* v. *Davis*, 127 F.2d 780, 782 (4th Cir. 1942).

wish to appeal a judgment of civil forfeiture to post a bond or seek a stay will lead to an "avalanche" of emergency stay motions that will increase "exponentially" the burden on the federal courts. Some losing claimants will decide not to appeal, and others will be able to obtain an automatic stay by posting a supersedeas bond. In many cases, the question presented here will not even arise, because the *res* will not be mobile in the first place. See *United States* v. *Tit's Cocktail Lounge*, 873 F.2d at 144 (appeal may proceed without stay as to real property that has not been sold). There is no indication that stay applications filed by the remaining claimants will create a significant burden for the courts. The Fifth, Seventh, Ninth, and Eleventh Circuits have held that removal of the *res* terminates the court's jurisdiction in an *in rem* forfeiture proceeding. See note 3, *supra*. Yet we are aware of no evidence, and petitioner cites none, that a flood of emergency stay motions has resulted in those circuits.

In sum, requiring losing claimants in an *in rem* forfeiture proceeding to take action to preserve the court's jurisdiction on appeal is neither unfair nor unduly burdensome. Because petitioner failed to take any steps to preserve the court's jurisdiction, its complaints about the dismissal of its appeal are not justified.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JUNE 1992

## APPENDIX

### U.S. Const., Article I

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No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; * * *

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### Article III.

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Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—[between a State and Citizens of another State;—]* between the same State claiming Lands under Grants of different States, [and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.]*

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial shall be

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* Changed by the Eleventh Amendment.

held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

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## 21 U.S.C. 881

### § 881. Forfeitures

**Subject property**

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1), (2), or (9).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consent-

ing party or privy to a violation of this subchapter or subchapter II of this chapter;

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and

(C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(8) All controlled substances which have been possessed in violation of this subchapter.

(9) All listed chemicals, all drug manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, which have been imported exported, manufactured, possessed, distributed, or intended to be distributed, imported, or exported, in violation of a felony provision of this subchapter or subchapter II of this chapter.

(10) Any drug paraphernalia (as defined in section 857 of this title).

(11) Any firearm (as defined in section 921 of Title 18) used or intended to be used to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2) and any proceeds traceable to such property.

**Seizure pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims; issuance of warrant authorizing seizure**

* * * * *

(b) Any property subject to civil forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when—

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this subchapter;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this subchapter.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure.

**Custody of Attorney General**

(c) Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under any of the provision of this subchapter, the Attorney General may—

(1) place the property under seal;

(2) remove the property to a place designated by him; or

(3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

**Other laws and proceedings applicable**

(d) The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this subchapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent

that such duties arise from seizures and forfeitures effected by any customs officer.

**Disposition of forfeited property**

(e)(1) Whenever property is civilly or criminally forfeited under this subchapter the Attorney General may—

(A) retain the property for official use or, in the manner provided with respect to transfers under section 1616a of Title 19, transfer the property to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property;

(B) sell, by public sale or any other commercially feasible means, any forfeited property which is not required to be destroyed by law and which is not harmful to the public;

(C) require that the General Services Administration take custody of the property and dispose of it in accordance with law;

(D) forward it to the Drug Enforcement Administration for disposition (including delivery for medical or scientific use to any Federal or State agency under regulations of the Attorney General); or

(E) transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer—

(i) has been agreed to by the Secretary of State;

(ii) is authorized in an international agreement between the United States and the foreign country; and

(iii) is made to a country which, if applicable, has been certified under section 2291(h) of Title 22.

(2)(A) The proceeds from any sale under subparagraph (B) of paragraph (1) and any moneys forfeited under this subchapter shall be used to pay—

(i) all property expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising, and court costs; and

(ii) awards of up to $100,000 to any individual who provides original information which leads to the arrest and conviction of a person who kills or kidnaps a Federal drug law enforcement agent.

Any award paid for information concerning the killing or kidnapping of a Federal drug law enforcement agent, as provided in clause (ii), shall be paid at the discretion of the Attorney General.

(B) The Attorney General shall forward to the Treasurer of the United States for deposit in accordance with section 524(c) of Title 28, any amounts of such moneys and proceeds remaining after payment of the expenses provided in subparagraph (A) except that, with respect to forfeitures conducted by the Postal Service, the Postal Service shall deposit in the Postal Service Fund, under section 2003(b)(7) of Title 39, such moneys and proceeds.

(3) The Attorney General shall assure that any property transferred to a State or local law enforcement agency under paragraph (1)(A)—

(A) has a value that bears a reasonable relationship to the degree of direct participation of

the State or local agency in the law enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law enforcement effort with respect to the violation of law on which the forfeiture is based; and

(B) will serve to encourage further cooperation between the recipient State or local agency and Federal law enforcement agencies.

**Forfeiture and destruction of schedule I and II substances**

(f) (1) All controlled substances in schedule I or II that are possessed, transferred, sold, or offered for sale in violation of the provisions of this subchapter; all dangerous, toxic, or hazardous raw materials or products subject to forfeiture under subsection (a) (2) of this section; and any equipment or container subject to forfeiture under subsection (a) (2) or (3) of this section which cannot be separated safely from such raw materials or products shall be deemed contraband and seized and summarily forfeited to the United States. Similarly, all substances in schedule I or II, which are seized or come into the possession of the United States, the owners of which are unknown, shall be deemed contraband and summarily forfeited to the United States.

(2) The Attorney General may direct the destruction of all controlled substances in schedule I or II seized for violation of this subchapter; all dangerous, toxic, or hazardous raw materials or products subject to forfeiture under subsection (a) (2) of this section; and any equipment or container subject to forfeiture under subsection (a) (2) or (3) of this section which cannot be separated safely from such

raw materials or products under such circumstances as the Attorney General may deem necessary.

**Plants**

(g) (1) All species of plants from which controlled substances in schedules I and II may be derived which have been planted or cultivated in violation of this subchapter, or of which the owners or cultivators are unknown, or which are wild growths, may be seized and summarily forfeited to the United States.

(2) The failure, upon demand by the Attorney General or his duly authorized agent, of the person in occupancy or in control of land or premises upon which such species of plants are growing or being stored, to produce an appropriate registration, or proof that he is the holder thereof, shall constitute authority for the seizure and forfeiture.

(3) The Attorney General, or his duly authorized agent, shall have authority to enter upon any lands, or into any dwelling pursuant to a search warrant, to cut, harvest, carry off, or destroy such plants.

**Vesting of title in United States**

(h) All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

**Stay of civil forfeiture proceedings**

(i) The filing of an indictment or information alleging a violation of this subchapter or subchapter II of this chapter, or a violation of State or local law that could have been charged under this subchapter or subchapter II of this chapter, which is also related

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to a civil forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the civil forfeiture proceeding.

**Venue**

(j) In addition to the venue provided for in section 1395 of Title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

**Agreement between Attorney General and Postal Service for performance of functions**

(*l*)[1] The functions of the Attorney General under this section shall be carried out by the Postal Service pursuant to such agreement as may be entered into between the Attorney General and the Postal Service.

**28 U.S.C. 524(c)**

**§ 524. Availability of appropriations**

* * * * *

(c)(1) There is established in the United States Treasury a special fund to be known as the Department of Justice Assets Forfeiture Fund (hereafter in this subsection referred to as the "Fund") which shall be available to the Attorney General without fiscal year limitation for the following purposes of the Department of Justice—

(A) the payment, at the discretion of the Attorney General, of any expenses necessary to

[1] So in original. No subsec. (k) has been enacted.

seize, detain, inventory, safeguard, maintain, advertise, or sell property under seizure, detention, or forfeited pursuant to any law enforced or administered by the Department of Justice, or of any other necessary expenses incident to the seizure, detention, or forfeiture of such property; such payments may include—

(i) payments for contract services, the employment of outside contractors to operate and manage properties or provide other specialized services as necessary to dispose of such properties in an effort to maximize the return from such properties, and payments to reimburse any Federal, State, or local agency for any expenditures made to perform the foregoing functions; and

(ii) payments made pursuant to regulations promulgated by the Attorney General, that are necessary and direct program-related expenses for the purchase or lease of automatic data processing equipment (not less than a majority of which use will be program related), training, printing, contracting for services directly related to the identification of forfeitable assets [2] processing of and accounting for forfeitures, and the storage, protection, and destruction of controlled substances;

(B) the payment of awards for information or assistance directly relating to violations of the criminal drug laws of the United States;

(C) the payment of awards for information or assistance leading to a civil or criminal for-

[2] So in original. Probably should be followed by a comma.

feiture under the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 800 et seq.) or a criminal forfeiture under the Racketeer Influenced and Corrupt Organizations statute (18 U.S.C. 1961 et seq.), at the discretion of the Attorney General;

(D) the compromise and payment of valid liens and mortgages against property that has been forfeited pursuant to any law enforced or administered by the Department of Justice, subject to the discretion of the Attorney General to determine the validity of any such lien or mortgage and the amount of payment to be made, and the employment of attorneys and other personnel skilled in State real estate law as necessary;

(E) disbursements authorized in connection with remission or mitigation procedures relating to property forfeited under any law enforced or administered by the Department of Justice;

(F) for equipping for drug law enforcement functions any government-owned or leased vessels, vehicles, and aircraft available for official use by the Drug Enforcement Administration, the Federal Bureau of Investigation, the Immigration and Naturalization Service, or the United States Marshals Service;

(G) for purchase of evidence of any violation of the Controlled Substances Act, the Controlled Substances Import and Export Act, chapter 96 of title 18, or sections 1956 and 1957 of title 18; and

(H) after all reimbursements and program-related expenses have been met at the end of fiscal year 1989, the Attorney General may trans-

fer deposits from the Fund to the building and facilities account of the Federal prison system for the construction of correctional institutions.

Amounts for paying the expenses authorized by subparagraphs (A)(ii), (B), (C), (F), and (G) shall be specified in appropriations acts. Amounts for other authorized expenditures and payments from the Fund, including equitable sharing payments, are not required to be specified in appropriations acts. The Attorney General may exempt the procurement of contract services under subparagraph (A) under the fund from section 3709 of the Revised Statutes of the United States (41 U.S.C. 5), title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 and following), and other provisions of law as may be necessary to maintain the security and confidentiality of related criminal investigations.

(2) Any award paid from the Fund for information, as provided in paragraph (1)(B) or (C), shall be paid at the discretion of the Attorney General or his delegate, under existing departmental delegation policies for the payment of awards, except that the authority to pay an award of $250,000 or more shall not be delegated to any person other than the Deputy Attorney General, the Associate Attorney General, the Director of the Federal Bureau of Investigation, or the Administrator of the Drug Enforcement Administration. Any award for information pursuant to paragraph (1)(B) shall not exceed $250,000. Any award for information pursuant to paragraph (1)(C) shall not exceed the lesser of $250,000 or one-fourth of the amount realized by the United States from the property forfeited.

(3) Any amount under subparagraph (F) of paragraph (1) shall be paid at the discretion of the At-

torney General or his delegate, except that the authority to pay $100,000 or more may be delegated only to the respective head of the agency involved.

(4) There shall be deposited in the Fund all amounts from the forfeiture of property under any law enforced or administered by the Department of Justice, except all proceeds of forfeitures available for use by the Secretary of the Treasury or the Secretary of the Interior pursuant to section 11(d) of the Endangered Species Act (16 U.S.C. 1540(d)) or section 6(d) of the Lacey Act Amendments of 1981 (16 U.S.C. 3375(d)) or the Postmaster General of the United States pursuant to section 2003(b)(7) of title 39.

(5) Amounts in the Fund which are not currently needed for the purpose of this section shall be kept on deposit or invested in obligations of, or guaranteed by, the United States and all earnings on such investments shall be deposited in the Fund.

(6) The Attorney General shall transmit to the Congress, not later than 4 months after the end of each fiscal year, two detailed reports as follows:

(A) a report on—

(i) the estimated total value of property forfeited under any law enforced or administered by the Department of Justice with respect to which funds were not deposited in the Fund; and

(ii) the estimated total value of all such property transferred to any State or local law enforcement agency; and

(B) a report on—

(i) the Fund's beginning balance;

(ii) sources of receipts (seized cash, conveyances, and others);

(iii) liens and mortgages paid and amount of money shared with State and local law enforcement agencies;

(iv) the net amount realized from the year's operations, amount of seized cash being held as evidence, and the amount of money legally allowed to be carried over to next year;

(v) any defendant's equity in property valued at $1,000,000 or more; and

(vi) Year-end Fund balance.

(7) The Fund shall be subject to annual audit by the Comptroller General.

(8) The provisions of this subsection relating to deposits in the Fund shall apply to all property in the custody of the Department of Justice on or after the effective date of the Comprehensive Forfeiture Act of 1983.

(9) There are authorized to be appropriated such sums as necessary for the purposes described in subparagraphs (A)(ii), (B), (C), (F), and (G) of paragraph (1). At the end of each of fiscal years 1990, 1991, and 1992, unobligated amounts not to exceed $150,000,000 remaining in the Fund shall be deposited in the Special Forfeiture Fund, except that an amount not to exceed $15,000,000 or, if determined necessary by the Attorney General to meet asset specific expenses, an amount equal to one-twelfth of the previous year's expenditures may be carried forward and remain available for appropriation in the next fiscal year.

(10) For the purposes of this subsection, property is forfeited pursuant to a law enforced or adminis-

tered by the Department of Justice if it is forfeited pursuant to—

(A) any criminal forfeiture proceeding;

(B) any civil judicial forfeiture proceeding; or

(C) any civil administrative forfeiture proceeding conducted by the Department of Justice,

except to the extent that the seizure was effected by a Customs officer or that custody was maintained by the United States Customs Service in which case the provisions of section 613A of the Tariff Act of 1930 (19 U.S.C. 1613a)[3] shall apply.

## Supplemental Rules for Certain Admiralty and Maritime Claims

### Rule C. Actions in Rem: Special Provisions

(1) When Available. An action in rem may be brought:

(a) To enforce any maritime lien;

(b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto.

Except as otherwise provided by law a party who may proceed in rem may also, or in the alternative, proceeed in personam against any person who may be liable.

Statutory provisions exempting vessels or other property owned or possessed by or operated by or for the United States from arrest or seizure are not affected by this rule. When a statute so provides, an action against the United States or an instrumentality thereof may proceed on in rem principles.

(2) Complaint. In actions, in rem the complaint shall be verified on oath or solemn affirmation. It

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[3] See References in Text note below.

shall describe with reasonable particularity the property that is the subject of the action and state that it is within the district or will be during the pendency of the action. In actions for the enforcement of forfeitures for violation of any statute of the United States the complaint shall state the place of seizure and whether it was on land or on navigable waters, and shall contain such allegations as may be required by the statute pursuant to which the action is brought.

(3) Judicial Authorization and Process. [Effective until Dec. 1, 1991. See, also, subd. (3) below.] Except in actions by the United States for forfeitures for federal statutory violations, the verified complaint and any supporting papers shall be reviewed by the court and, if the conditions for an action in rem appear to exist, an order so stating and authorizing a warrant for the arrest of the vessel or other property that is the subject of the action shall issue and be delivered to the clerk who shall prepare the warrant and deliver it to the marshal for service. If the property that is the subject of the action consists in whole or in part of freight, or the proceeds of property sold, or other intangible property, the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment. Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court. If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and warrant for the arrest and the plaintiff shall have the burden on a post-arrest hearing under Rule E(4)(f) to show that exigent circumstances existed. In actions by the United States for forfeitures for federal statutory violations, the clerk, upon filing of the com-

plaint, shall forthwith issue a summons and warrant for the arrest of the vesel or other property without requiring a certification of exigent circumstances.

(3) Judicial Authorization and Process. [Effective on Dec. 1, 1991. See, also, subd. (3) above.] Except in actions by the United States for forfeitures or federal statutory violations, the verified complaint and any supporting papers shall be reviewed by the court and, if the conditions for an action in rem appear to exist, an order so stating and authorizing a warrant for the arrest of the vessel or other property that is the subject of the action shall issue and be delivered to the clerk who shall prepare the warrant. If the property is a vessel or a vessel and tangible property on board the vessel, the warrant shall be delivered to the marshal for service. If other property, tangible or intangible is the subject of the action, the warrant shall be delivered by the clerk to a person or organization authorized to enforce it, who may be a marshal, a person or organization contracted with by the United States, a person specially appointed by the court for that purpose, or, if the action is brought by the United States, any officer or employee of the United States. If the property that is the subject of the action consists in whole or in part of freight, or the proceeds of property sold, or other intangible property, the clerk shall issue a sumons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment. Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court. If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and warrant for the arrest and the plaintiff shall have the burden on a post-

arrest hearing under Rule E(4)(f) to show that exigent circumstances existed. In actions by the United States for forfeitures for federal statutory violations, the clerk, upon filing of the complaint, shall forthwith issue a summons and warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances.

(4) Notice. No notice other than the execution of the process is required when the property that is the subject of the action has been released in accordance with Rule E(5). If the property is not released within 10 days after execution of process, the plaintiff shall promptly or within such time as may be allowed by the court cause public notice of the action and arrest to be given in a newspaper of general circulation in the district, designated by order of the court. Such notice shall specify the time within which the answer is required to be filed as provided by subdivision (6) of this rule. This rule does not affect the requirements of notice in actions to foreclose a preferred ship mortgage pursuant to the Act of June 5, 1920, ch. 250, § 30, as amended.

(5) Ancillary Process. [Effective until Dec. 1, 1991. See, also, subd. (5) below.] In any action in rem in which process has been served as provided by this rule, if any part of the property that is the subject of the action has not been brought within the control of the court because it has been removed or sold, or because it is intangible property in the hands of a person who has not been served with process, the court may, on motion, order any person having possession or control of such property or its proceeds to show cause why it should not be delivered into the custody of the marshal or paid into court to abide the judgment; and, after hearing, the court may enter such judgment as law and justice may require.

(5) Ancillary Process. [Effective on Dec. 1, 1991. See, also, subd. (5) above.] In any action in rem in which process has been served as provided by this rule, if any part of the property that is the subject of the action has not been brought within the control of the court because it has been removed or sold, or because it is intangible property in the hands of a person who has not been served with process, the court may, on motion, order any person having possession of control of such property or its proceeds to show cause why it should not be delivered into the custody of the marshal or other person or organization having a warrant for the arrest of the property, or paid into court to abide the judgment; and, after hearing, the court may enter such judgment as law and justice may require.

(6) Claim and Answer; Interrogatories. The claimant of property that is the subject of an action in rem shall file a claim within 10 days after process has been executed, or within such additional time as may be allowed by the court, and shall serve an answer within 20 days after the filing of the claim. The claim shall be verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action. If the claim is made on behalf of the person entitled to possession by an agent, bailee, or attorney, it shall state that the agent, bailee, or attorney is duly authorized to make the claim. At the time of answering the claimant shall also serve answers to any interrogatories served with the complaint. In actions in rem interrogatories may be so served without leave of court.

**Rule E. Actions in Rem and Quasi in Rem: General Provisions**

(1) Applicability. Except as otherwise provided, this rule applies to actions in personam with process of maritime attachment and garnishment, actions in rem, and petitory, possessory, and partition actions, supplementing Rules B, C, and D.

(2) Complaint; Security.

(a) *Complaint.* In actions to which this rule is applicable the complaint shall state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading.

(b) *Security for Costs.* Subject to the provisions of Rule 54(d) and of relevant statutes, the court may, on the filing of the complaint or on the appearance of any defendant, claimant, or any other party, or at any later time, require the plaintiff, defendant, claimant, or other party to give security, or additional security, in such sum as the court shall direct to pay all costs and expenses that shall be awarded against the party by an interlocutory order or by the final judgment, or on appeal by any appellate court.

(3) Process.

(a) *Territorial Limits of Effective Service.* Process in rem and of maritime attachment and garnishment shall be served only within the district.

(b) *Issuance and Delivery.* Issuance and delivery of process in rem, or of maritime attachment and garnishment, shall be held in abeyance if the plaintiff so requests.

(4) Execution of Process; Marshal's Return; Custody of Property; Procedures for Release. [Effective until Dec. 1, 1991. See, also, subd. (4) below.]

*(a) In General.* Upon issuance and delivery of the process, or, in the case of summons with process of attachment and garnishment, when it appears that the defendant cannot be found within the district, the marshal shall forthwith execute the process in accordance with this subdicision (4), making due and prompt return.

*(b) Tangible Property.* If tangible property is to be attached or arrested, the marshal shall take it into the marshal's possession for safe custody. If the character or situation of the property is such that the taking of actual possession is impracticable, the marshal shall execute the process by affixing a copy thereof to the property in a conspicuous place and by leaving a copy of the complaint and process with the person having possession or the person's agent. In furtherance of the marshal's custody of any vessel the marshal is authorized to make a written request to the collector of customs not to grant clearance to such vessel until notified by the marshal or a deputy marshal or by the clerk that the vessel has been released in accordance with these rules.

*(c) Intangible Property.* If intangible property is to be attached or arrested the marshal shall execute the process by leaving with the garnishee or other obligor a copy of the complaint and process requiring the garnishee or other obligor to answer as provided in Rules B(3)(a) and C(6); or the marshal may accept for payment into the registry of the court the amount owed to the extent of the amount claimed by the plaintiff with interest and costs, in which event

the garnishee or other obligor shall not be required to answer unless alias process shall be served.

*(d) Directions with Respect to Property in Custody.* The marshal may at any time apply to the court for directions with respect to property that has been attached or arrested, and shall give notice of such application to any or all of the parties as the court may direct.

*(e) Expenses of Seizing and Keeping Property; Deposit.* These rules do not alter the provisions of Title 28, U.S.C., § 1921, as amended, relative to the expenses of seizing and keeping property attached or arrested and to the requirement of deposits to cover such expenses.

*(f) Procedure for Release from Arrest or Attachment.* Whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted consistent with these rules. This subdivision shall have no application to suits for seamen's wages when process is issued upon a certification of sufficient cause filed pursuant to Title 46, U.S.C. §§ 603 and 604 or to actions by the United States for forfeitures for violation of any statute of the United States.

(4) Execution of Process; Marshal's Return; Custody of Property; Procedures for Release [Effective on Dec. 1, 1991. See, also, subd. (4) above.]

*(a) In General.* Upon issuance and delivery of the process, or, in the case of summons with process of attachment and garnishment, when it appears that the defendant cannot be found within the district, the marshal or other person

or organization having a warrant shall forthwith execute the process in accordance with this subdivision (4), making due and prompt return.

*(b) Tangible Property.* If tangible property is to be attached or arrested, the marshal or other person or organization having the warrant shall take it into the marshal's possession for safe custody. If the character or situation of the property is such that the taking of actual possession is impracticable, the marshal or other person executing the process shall affix a copy thereof to the property in a conspicuous place and leave a copy of the complaint and process with the person having possession or the person's agent. In furtherance of the marshal's custody of any vessel the marshal is authorized to make a written request to the collector of customs not to grant clearance to such vessel until notified by the marshall or deputy marshal or by the clerk that the vessel has been released in accordance with these rules.

*(c) Intangible Property.* If intangible property is to be attached or arrested the marshal or other person or organization having the warrant shall execute the process by leaving with the garnishee or other obligor a copy of the complaint and process requiring the garnishee or other obligor to answer as provided in Rules B(3)(a) and C(6); or the marshal may accept for payment into the registry of the court the amount owed to the extent of the amount claimed by the plaintiff with interest and costs, in which event the garnishee or other obligor shall not be required to answer unless alias process shall be served.

*(d) Directions With Respect to Property in Custody.* The marshal or other person or organization having the warrant may at any time apply to the court for directions with respect to property that has been attached or arrested, and shall give notice of such application to any or all of the parties as the court may direct.

(5) Release of Property.

*(a) Special Bond.* Except in cases of seizures for forfeiture under any law of the United States, whenever process of maritime attachment and garnishment or process in rem is issued the execution of such process shall be stayed, or the property released, on the giving of security, to be approved by the court or clerk, or by stipulation of the parties, conditioned to answer the judgment of the court or of any appellate court. The parties may stipulate the amount and nature of such security. In the event of the inability or refusal of the parties so to stipulate the court shall fix the principal sum of the bond or stipulation at an amount sufficient to cover the amount of the plaintiff's claim fairly stated with accrued interest and costs; but the principal sum shall in no event exceed (i) twice the amount of the plaintiff's claim or (ii) the value of the property on due appraisement, whichever is smaller. The bond or stipulation shall be conditioned for the payment of the principal sum and interest thereon at 6 per cent per annum.

*(b) General Bond.* The owner of any vessel may file a general bond or stipulation, with sufficient surety, to be approved by the court, conditioned to answer the judgment of such court in all or any actions that may be brought thereafter in such court in which the vessel is attached or arrested. Thereupon the execution of all such process against such vessel

shall be stayed so long as the amount secured by such bond or stipulation is at least double the aggregate amount claimed by plaintiffs in all actions begun and pending in which such vessel has been attached or arrested. Judgments and remedies may be had on such bond or stipulation as if a special bond or stipulation had been filed in each of such actions. The district court may make necessary orders to carry this rule into effect, particularly as to the giving of proper notice of any action against or attachment of a vessel for which a general bond has been filed. Such bond or stipulation shall be indorsed by the clerk with a minute of the actions wherein process is so stayed. Further security may be required by the court at any time.

If a special bond or stipulation is given in a particular case, the liability on the general bond or stipulation shall cease as to that case.

*(c) Release by Consent or Stipulation; Order of Court or Clerk; Costs.* [*Effective until Dec. 1, 1991. See, also, subd. (5)(c) below.*] Any vessel, cargo, or other property in the custody of the marshal may be released forthwith upon the marshal's acceptance and approval of a stipulation, bond, or other security, signed by the party on whose behalf the property is detained or the party's attorney and expressly authorizing such release, if all costs and charges of the court and its officers shall have first been paid. Otherwise no property in the custody of the marshal or other officer of the court shall be released without an order of the court; but such order may be entered as of course by the clerk, upon the giving of approved security as provided by law and these rules, or upon the dismissal or discontinuance of the action; but the marshal shall not deliver any property so released un-

til the costs and charges of the officers of the court shall first have been paid.

*(c) Release by Consent or Stipulation; Order of Court or Clerk; Costs.* [*Effective Dec. 1, 1991. See, also, subd. (5)(c) above.*] Any vessel, cargo, or other property in the custody of the marshal or other person or organization having the warrant may be released forthwith upon the marshal's acceptance and approval of a stipulation, bond, or other security, signed by the party on whose behalf the property is detained or the party's attorney and expressly authorizing such release, if all costs and charges of the court and its officers shall have first been paid. Otherwise no property in the custody of the marshal, other person or organization having the warrant, or other officer of the court shall be relased without an order of the court; but such order may be entered as of course by the clerk, upon the giving of approved security as provided by law and these rules, or upon the dismissal or discontinuance of the action; but the marshal or other person or organization having the warrant shall not deliver any property so released until the costs and charges of the officers of the court shall first have been paid.

*(d) Possessory, Petitory, and Partition Actions.* The foregoing provisions of this subdivision (5) do not apply to petitory, possessory, and partition actions. In such cases the property arrested shall be released only by order of the court, on such terms and conditions and on the giving of such security as the court may require.

(6) Reduction or Impairment of Security. Whenever security is taken the court may, on motion and hearing, for good cause shown, reduce the amount of security given; and if the surety shall be or become

insufficient, new or additional sureties may be required on motion and hearing.

(7) Security on Counterclaim. Whenever there is asserted a counterclaim arising out of the same transaction or occurrence with respect to which the action was originally filed, and the defendant or claimant in the original action has given security to respond in damages, any plaintiff for whose benefit such security has been given shall give security in the usual amount and form to respond in damages to the claims set forth in such counterclaims, unless the court, for cause shown, shall otherwise direct; and proceedings on the original claim shall be stayed until such security is given, unless the court otherwise directs. When the United States or a corporate instrumentality thereof as defendant is relieved by law of the requirement of giving security to respond in damages it shall nevertheless be treated for the purposes of this subdivision E(7) as if it had given such security if a private person so situated would have been required to give it.

(8) Restricted Appearance. An appearance to defend against an admiralty and maritime claim with respect to which there has issued process in rem, or process of attachment and garnishment whether pursuant to these Supplemental Rules or to Rule 4(e), may be expressly restricted to the defense of such claim, and in that event shall not constitute an appearance for the purposes of any other claim with respect to which such process is not available or has not been served.

(9) Disposition of Property; Sales.

*(a) Actions for Forfeitures.* In any action in rem to enforce a forfeiture for violation of a statute of the

United States the property shall be disposed of as provided by statute.

*(b) Interlocutory Sales.* [*Effective until Dec. 1, 1991. See also, subd. (9)(b) below.*] If property that has been attached or arrested is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of property, the court, on application of any party or of the marshal, may order the property or any portion thereof to be sold; and the proceeds, or so much thereof as shall be adequate to satisfy any judgment, may be ordered brought into court to abide the event of the action; or the court may, on motion of the defendant or claimant, order delivery of the property to the defendant or claimant, upon the giving of security in accordance with these rules.

*(b) Interlocutory Sales.* [*Effective on Dec. 1, 1991. See, also, subd. (9)(b) above.*] If property that has been attached or arrested is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of property, the court, on application of any party or of the marshal, or other person or organization having the warrant, may order the property or any portion thereof to be sold; and the proceeds, or so much thereof as shall be adequate to satisfy any judgment, may be ordered brought into court to abide the event of the action; or the court may, upon motion of the defendant or claimant, order delivery of the property to the defendant or claimant, upon the giving of security in accordance with these rules.

*(c) Sales, Proceeds.* [*Effective until Dec. 1, 1991. See, also, subd. (9)(c) below.*] All sales of property shall be made by the marshal or a deputy marshal, or other proper officer assigned by the court where the marshal is a party in interest; and the proceeds of sale shall be forthwith paid into the registry of the court to be disposed of according to law.

*(c) Sales, Proceeds.* [*Effective on Dec. 1, 1991. See, also, subd. (9)(c) above.*] All sales of property shall be made by the marshal or a deputy marshal, or by other person or organization having the warrant, or by any other person assigned by the court where the marshal or other person or organization having the warrant is a party in interest; and the proceeds of sale shall be forthwith paid into the registry of the court to be disposed of according to law.

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